MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

SAME-SEX PARTNER BENEFITS, MARRIAGE AMENDMENT AT ISSUE IN CASE BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS NEXT WEEK

LANSING, MI, November 1, 2007 – Does the Michigan Constitution, which defines marriage as "the union of one man and one woman," bar public employers from extending health care benefits to employees' same-sex domestic partners? That question will be considered by the Michigan Supreme Court during oral arguments next week.

The state Constitution's "Marriage Amendment," approved by Michigan voters in November 2004, states that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." A 2005 formal opinion by the Attorney General concluded that the Marriage Amendment prohibits acknowledgement of same-sex and unmarried opposite-sex relationships. In *National Pride at Work v Governor of Michigan*, the plaintiffs seek a declaratory judgment that the Marriage Amendment does not prohibit public employers from conferring health benefits on employees' same-sex domestic partners. The Michigan Court of Appeals held that providing same-sex domestic partner benefits recognized those same-sex relationships as a marriage, thus violating the Marriage Amendment. Although a named defendant in the case, the Governor is among those appealing the Court of Appeals' ruling.

The Court will also hear *Estes v Titus*, in which a woman seeks to collect wrongful death damages for her husband's 1990 murder. More than a decade after the plaintiff's husband and another man were found shot in the Fulton State Game Area in Kalamazoo County, Jeff Edward Titus was convicted of the murders and sentenced to life imprisonment without parole. Soon after the plaintiff brought a wrongful death action against Titus, Titus' wife filed for divorce and was awarded substantially all of the marital assets in the divorce, in part to make up for Titus' inability to provide child support for their daughter. In a split decision, the Michigan Court of Appeals ruled that the plaintiff, who won a judgment in the wrongful death case, could challenge the marital property transfer under the Uniform Fraudulent Transfer Act; Titus' ex-wife appeals that ruling.

Also before the Supreme Court are *Pontiac Fire Fighters Union Local 376 v City of Pontia*c and *Detroit Firefighters Association v City of Detroit*. In both cases, the cities sought to lay off firefighters as part of budget reductions, but were blocked by court injunctions upheld by the Court of Appeals. The trial courts found persuasive the firefighters' arguments that layoffs would cause irreparable harm by affecting firefighters' and the public's safety. In both cases, the Court of Appeals affirmed the lower courts' rulings.

The remaining cases involve property, procedural, insurance, worker's compensation, zoning, and criminal law issues.

Court will be held on **November 6, 7, and 8** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

The arguments may also be viewed on Michigan Government Television, which will begin its live broadcast at 10 a.m., joining the arguments in progress. For more information about MGTV broadcasts, including a list of cable channels that air MGTV, visit http://www.mgtv.org.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, November 6
Morning Session

PEOPLE v MURPHY (case no. 132421)
Prosecuting attorney: Jeffrey Caminsky/(313) 224-5826
Attorney for defendant Bernard Chauncey Murphy: Robin M. Lerg/(248) 649-4777
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Judith B. Ketchum/(269) 383-8900
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/132421/132421-Index.htm
At issue: The defendant's attorney failed to respond to the prosecutor's interlocutory application for leave to appeal, which challenged an evidentiary ruling made by the trial court. The Court of Appeals granted the relief sought by the prosecutor. The case then proceeded to trial (with the disputed evidence) and the defendant was convicted. Was defense counsel's failure a denial of the right to counsel, amounting to structural error? Or does the ineffective-assistance-of-counsel standard of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), apply? If the defendant is entitled to a remedy, should his convictions be set aside and a new trial granted? Or should he be granted a second appellate review of the disputed evidentiary ruling, with the assistance of counsel?
Background: Christopher Holman and Tammy Isaac were driving to the Thanksgiving Day Parade in Detroit when their car was struck from behind by a pickup truck. While Holman inspected the car for damage, two men, one holding a sawed-off shotgun, got out of the truck. The two men robbed Holman and Isaac and left. Early the next morning, another motorist was robbed in a similar way by men driving the same type of truck that had been used in the Thanksgiving Day robbery. A police officer spotted the suspects' vehicle at a gas station and called for backup; the truck was stopped by police a short distance away. Shotgun shells were found in the truck, and similar shells were found in a trash receptacle at the gas station where the suspects were spotted. A sawed-off shotgun was discovered in the back of the gas station.

Murphy, who was identified by one of the victims, was charged with two counts of armed robbery and one count of felony-firearm. The victims also told the police that the shotgun found at the gas station looked like the one used by the men who robbed them. Shortly before the trial, the prosecutor asked the trial judge to admit into evidence the shotgun shells and the shotgun. The trial court ruled that the shotgun shells could be admitted into evidence, but not the shotgun. The prosecutor filed an emergency interlocutory application for leave to appeal in the Court of Appeals, seeking to have the shotgun admitted. Murphy's trial attorney did not respond to this emergency appeal. The Court of Appeals ruled in the prosecutor's favor, and the case proceeded to trial, with the shotgun admitted into evidence. Murphy was convicted of two counts of armed robbery and one count of felony-firearm. He was sentenced to concurrent 15-to-30-year terms of imprisonment on the robbery convictions and a consecutive two-year term of imprisonment on the felony-firearm conviction. Murphy appealed, arguing that his trial counsel's failure to respond to the prosecutor's emergency appeal amounted to ineffective assistance of counsel. In an unpublished opinion, the Court of Appeals agreed and granted Murphy a new trial, finding that Murphy's trial counsel was ineffective for failing to oppose the prosecutor's emergency appeal. As a result, Murphy was denied counsel at a critical stage of the proceedings, the appellate panel held. The prosecutor appeals.

NATIONAL PRIDE AT WORK, INC., et al. v GOVERNOR OF MICHIGAN, et al. (case nos. 133429, 133554)
Attorney for plaintiffs National Pride At Work, Inc., a non-profit organization on behalf of its Michigan Members, et al.: Scott L. Gorland/(313) 259-7110
Attorney for defendant Governor of Michigan: D. J. Pascoe/(517) 373-7700
Attorney for intervening defendant Attorney General: B. Eric Restuccia/(517) 373-4875
Attorneys for amicus curiae American Association of University Professors: Scott A. Brooks, Gordon A. Gregory/(313) 964-5600
Attorney for amicus curiae Regents of the University of Michigan, The Board of Governors of Wayne State University, Central Michigan Board of Trustees, The Board of Control of Northern Michigan University, Michigan Technological University, Saginaw Valley State University, and The Board of Regents of Eastern Michigan University: Gloria A. Hage/(734) 764-0304
Attorney for amicus curiae Michigan State University: Theresa Kelley/(517) 353-3530
Attorney for amicus curiae Michigan Education Association: Theresa J. Alderman/(517) 332-6551
Attorney for amicus curiae International Union, UAW and its Local 6000: Georgi-Ann Bargamian/(313) 926-5216
Attorney for amicus curiae Michigan Pride At Work, Service Employees International Union (SEIU) Local 517M, The American Federation of Labor and Congress of Industrial Organization Michigan Chapter (MI-AFL-CIO), The Office and Professional Employees International Union (OPEIU) Local 459, and the Lansing Association of Human Rights (LAHR): Cynthia Ann Paul/(517) 482-4886
Attorney for amicus curiae Lambda Legal Defense and Education Fund, Inc., Human Rights Campaign, Human Rights Campaign Foundation, Triangle Foundation, Michigan Equality, The Women Lawyers Association of Michigan, and Parents, Families & Friends of Lesbians & Gays, Inc. (Affiliates: Ann Arbor, Bay City, Detroit, Flint, Grand Rapids, Holland, Iron Mountain, Jackson, Kalamazoo, Keweenaw, Lansing, Mt. Pleasant, Port Huron, St. Joseph, and Traverse City): Henry M. Grix/(248) 433-7548

Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Attorney for amicus curiae Michigan Family Forum: James R. Wierenga/(616) 454-3883
Attorney for amicus curiae Citizens for the Protection of Marriage: Patrick T. Gillen/(734) 827-2001
Attorney for amicus curiae American Family Association of Michigan: LaRae G. Munk/(989) 832-2889
Attorney for amicus curiae City of Ann Arbor: Stephen K. Postema/(734) 994-2670
Trial court: Ingham County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/133429/133429-Index.htm
At issue: Does the Marriage Amendment to Michigan's Constitution bar various public sector employers from providing health insurance benefits to employees' qualified same-sex domestic partners? The trial court found that providing domestic partner benefits does not violate the Marriage Amendment because of the dissimilarities between marriage and the criteria for domestic partner medical benefits. The Court of Appeals, in a published opinion, reversed, giving its decision immediate effect.
Background: On November 2, 2004, Michigan voters approved a ballot proposal that added the "Marriage Amendment" to the Michigan Constitution. The Marriage Amendment took effect on December 18, 2004. At that time, several public employers, including state universities and various city and county governments, had policies or agreements that extended health care benefits to their employees' same-sex domestic partners. In addition, the Office of State Employer and United Auto Workers Local 6000 had agreed to include same-sex domestic partner benefits in the benefit packages for Local 6000's state employee members. On March 16, 2005, in response to a state legislator's request, the Attorney General issued a formal opinion concluding that the Marriage Amendment prohibits acknowledgement of same-sex and unmarried opposite-sex relationships, and that the only relationship that may be given any recognition or acknowledgement of validity is the union of one man and one woman in marriage. The plaintiffs sued Governor Jennifer Granholm in her official capacity, seeking a declaratory judgment that the Marriage Amendment does not prohibit public employers from conferring health benefits on employees' same-sex domestic partners. The plaintiffs later added the city of Kalamazoo as a defendant, after the city announced that, unless a court ruled that it could do so without violating the Marriage Amendment, the city would no longer provide same-sex domestic partner health care benefits for its employees. The Governor filed a brief supporting the plaintiffs. The Attorney General then intervened and asked the trial court to dismiss the plaintiffs' lawsuit. But the trial court ruled in the plaintiffs' favor, declaring that the Marriage Amendment does not prohibit public employers from entering into contractual agreements to provide same-sex domestic partner fringe benefits, because health care benefits are not statutory rights or benefits of marriage. The court reasoned that the public employers were not "recognizing" domestic partnerships as equivalent to marriage. The Attorney General appealed and the Court of Appeals reversed in a unanimous published opinion. The Court of Appeals held that the domestic partnership agreements were similar to marriage. Providing same-sex domestic partner benefits based on those relationships recognized those relationships as a marriage, thus violating the Marriage Amendment, the Court of Appeals reasoned. Noting that this was an issue of first impression, the appellate panel found that the language of Michigan's Marriage Amendment was unique; as a result, decisions from other states were not relevant, the Court of Appeals said. The language of the amendment was unambiguous, said the court; accordingly,

extrinsic evidence regarding the circumstances of the amendment's adoption was unnecessary and irrelevant. The court gave its decision immediate effect. The plaintiffs and the Governor appeal.

Afternoon Session

ESTES v TITUS, et al. (case no. 133098)
Attorney for plaintiff Jan Kay Estes, Personal Representative of the Estate of Douglas Duane Estes: H. van den Berg Hatch/(269) 349-7686
Attorneys for defendant Julie L. Swabash, f/k/a Julie L. Titus: Michael J. Toth, James D. Lance/(269) 324-3000
Attorney for amicus curiae Business Law Section of the State Bar of Michigan: Lisa S. Gretchko/(248) 723-0396
Attorney for amicus curiae State Bar of Michigan's Family Law Section: Liisa R. Speaker/(517) 482-8933
Trial court: Kalamazoo County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/133098/133098-Index.htm
At issue: The plaintiff sought to recover wrongful death damages from the man who murdered her husband. But the defendant, who was sentenced to life in prison for the murder, had entered into a divorce judgment which gave most of the marital property to his wife. The plaintiff sought to reach the transferred assets by including the defendant's ex-wife in the wrongful death action, relying on the Uniform Fraudulent Transfer Act. Are a court's determinations about the division of assets in a divorce subject to review under the UFTA?
Background: During the 1990 deer hunting season, Douglas Estes and another man were found shot to death in the Fulton State Game Area in Kalamazoo County. More than a decade later, police determined that the two victims had been murdered by Jeff Edward Titus. In 2002, Titus was convicted of first-degree murder and sentenced to life imprisonment without parole. In September 2002, Jan Kay Estes, Douglas Estes' widow, filed a wrongful death action against Titus. In November 2002, Titus' wife, now Julie Swabash, filed for divorce. She was awarded substantially all of the marital assets in the divorce, in part to make up for Titus' inability to provide child support for their daughter due to his imprisonment. Estes tried unsuccessfully to intervene in the divorce action. After Estes won a judgment in the wrongful death case, she moved to include Swabash in the lawsuit, so that Estes could reach the assets that had been transferred in the divorce. Estes argued that she could do so under the Uniform Fraudulent Transfer Act; Titus' transfer of marital property in the divorce proceeding was inequitable and was intended to defraud her, Estes contended. The trial court refused Estes' request to add Swabash as a party, but the Court of Appeals reversed in a split published opinion, holding that transfers ordered as part of the divorce judgment were subject to examination under the UFTA. Swabash appeals.

MATHER INVESTORS, LLC v LARSON, et al. (case no. 131654)
Attorney for plaintiff Mather Investors, LLC, d/b/a Mather Nursing Center: Randolph B. Osstyn/(906) 228-3650
Attorney for defendant William Larson: Bruce L. Houghton/(906) 475-4408
Trial court: Marquette County Circuit Court
Link to briefs:

http://www.courts.michigan.gov/supremecourt/Clerk/11-07/131654/131654-Index.htm
At issue: A nursing home resident transferred a savings account and real estate to her nephew; she died owing the nursing home for her care. Although the nursing home sued both the resident and her nephew for fraudulent transfer, the resident died a week after the lawsuit was filed, and was never served with the complaint. The nursing home did not add her estate as a party, and the trial judge ultimately dismissed the case against the nephew, finding that the aunt's estate was a necessary party. The court also denied the nursing home's motion to then add the estate as a defendant, reasoning that the nephew would be prejudiced by the delay. In a fraudulent transfer case, if the debtor is dead, must the plaintiff sue the debtor's estate to get relief from the debtor's alleged fraud? Did the lower courts in this case correctly rule that the nephew would have been prejudiced by the nursing home's delay in adding the estate to the lawsuit?
Background: Alice Maddock resided at Mather Nursing Center; Medicare paid for her care from her admission in June 2002 until August 2002, at which time she became a private pay patient. On July 22, 2002, Maddock transferred her savings account to her nephew, William Larson. In October 2002, when she owed the nursing home about $11,000, Maddock also transferred two real estate parcels to Larson by quit claim deed. A week before Maddock died at the nursing home in August 2003, the nursing home sued her and Larson to recover an outstanding debt for Maddock's care; the nursing home claimed in part that Maddock fraudulently transferred her assets to Larson. Maddock was not served before her death; Larson answered the nursing home's complaint, attaching a copy of Maddock's death certificate; Maddock was dismissed from the lawsuit for lack of service. The nursing home did not petition the trial court to open an estate for Maddock or seek to add her estate as a party by a June 14, 2004 deadline set by the court. Both parties moved for summary disposition, with Larson arguing that the case against him must be dismissed. His aunt's estate was a necessary party to the lawsuit, Larson argued, contending that the nursing home would be unable to obtain a judgment against him without including Maddock's estate. The nursing home argued that the court should enter a judgment in its favor, asserting that Larson had admitted during his deposition that he had no evidence to dispute the nursing home's fraudulent transfer claim. But the trial judge denied the nursing home's motion, reasoning that Maddock's estate was a necessary party. The judge also later denied the nursing home's motion to substitute the estate as a party; the trial judge found that Larson was prejudiced by the nursing home's delay in making the substitution. In a published opinion, the Court of Appeals affirmed. The nursing home appeals.

Wednesday, November 7
Morning Session

PONTIAC FIRE FIGHTERS UNION LOCAL 376 v CITY OF PONTIAC (case no. 132916)
Attorney for plaintiff Pontiac Fire Fighters Union Local 376: Gordon A. Gregory/(313) 964-5600
Attorney for defendant City of Pontiac: Jonathon A. Rabin/(313) 965-7610
Attorney for amicus curiae Michigan Municipal League and the Michigan Association of Counties: Melvin J. Muskovitz/(734) 214-7660
Attorney for amicus curiae International Association of Fire Fighters and the Michigan Professional Fire Fighters Union: Bryan G. Polisuk/(202) 833-8855
Attorney for amicus curiae Michigan State AFL-CIO: Mary Ellen Gurewitz/(313) 965-3464
Trial court: Oakland County Circuit Court

Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/132916/132916-Index.htm
At issue: The fire fighters' union and the city of Pontiac are parties to a collective bargaining agreement that prohibits layoffs of bargaining unit personnel during the agreement's term. The city proposed to lay off 28 firefighters, but the union sought an injunction to prevent the layoffs. The trial court granted a preliminary injunction and the Court of Appeals affirmed. Did the trial court have jurisdiction to grant a preliminary injunction? If so, did the trial court abuse its discretion in issuing the injunction? Is the union likely to prevail on its breach of contract and unfair labor practice claims?
Background: Pontiac Fire Fighters Union Local 376 and the city of Pontiac are parties to a collective bargaining agreement that expired in June 2004; the agreement is "extended automatically thereafter on a daily basis until a new contract is negotiated or ordered." The collective bargaining agreement prohibits layoffs of bargaining unit personnel during the agreement's term, although the agreement also states that notice of layoffs will be provided 14 days ahead of time and layoffs will take place in reverse order of seniority. As part of its deficit elimination plan, the city proposed to layoff 28 firefighters. The layoffs were announced to the union 60 days before they were to take effect. The union refused to accept the layoffs, and filed a grievance and an unfair labor practice charge with the Michigan Employment Relations Commission. The union also sued the city, seeking an injunction to prevent the layoffs. The union claimed that if the layoffs were implemented, the fire department would have to close fire stations, eliminate rescue units, and make other changes that would affect firefighter safety. The city responded that the layoffs would have no impact on firefighter safety, supporting this claim with an affidavit from the city's fire chief. The trial court granted the union's request for a preliminary injunction and prohibited the city from laying off any firefighters "[u]ntil such time as all bargaining, contract and statutory procedures are exhausted such as compulsory arbitration under MCL 423.231 (Act 312)." The court held that the union would be irreparably harmed if the layoffs took place because the workforce would be reduced, fire stations would close, firefighters would face an increased risk of harm, and fewer firefighters would be able to respond to fires. The trial court also held that the union was likely to succeed on the merits. The Court of Appeals affirmed in a split, unpublished per curiam opinion. The majority concluded that the trial court's decision to issue a preliminary injunction was "within the range of principled outcomes." The dissenting judge disagreed, concluding that the union failed to establish a likelihood of irreparable harm, because any harm could be remedied by traditional damages. The city appeals.

DETROIT FIREFIGHTERS ASSOCIATION, I.A.F.F. LOCAL 344 v CITY OF DETROIT (case no. 131463)
Attorney for plaintiff Detroit Firefighters Association, I.A.F.F. Local 344: Ronald R. Helveston/(313) 963-7220
Attorneys for defendant City of Detroit: Bruce A. Campbell/(313) 237-3072, Nancy Sorensen Ninowski/(313) 224-4550
Attorney for amicus curiae Michigan Municipal League and the Michigan Association of Counties: Melvin J. Muskovitz/(734) 214-7660
Attorney for amicus curiae Michigan State AFL-CIO: Mary Ellen Gurewitz/(313) 965-3464
Attorney for amicus curiae City of Iron Mountain: John H. Gretzinger/(616) 954-2546
Attorney for amicus curiae Detroit Police Officers Association: Donato Iorio/(616) 940-1911
Attorney for amicus curiae Michigan AFSCME Council 25, AFL-CIO: Bruce A. Miller/(313) 964-4454

Attorney for amicus curiae Michigan Association of Police Organizations: John A. Lyons/(248) 524-0890
Attorney for amicus curiae International Association of Fire Fighters: Bryan G. Polisuk/(202) 833-8855
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/131463/131463-Index.htm
At issue: The defendant city and the plaintiff firefighters association are involved in Act 312 arbitration proceedings. Act 312 requires parties to maintain existing wages, hours and other conditions of employment pending the outcome of arbitration. But the parties' collective bargaining agreement acknowledges that restructuring and layoffs are within the city's managerial prerogative (and are therefore not mandatory subjects of bargaining). Does the circuit court have jurisdiction to hear complaints that an employer has violated Act 312 by changing the conditions of employment while arbitration is pending? Or does a complaint have to be filed with the Michigan Employment Relations Commission?
Background: The city of Detroit and the Detroit Firefighters Association are involved in ongoing arbitration proceedings under MCL 423.231 *et seq*., commonly known as Act 312. The last collective bargaining agreement between the parties expired on June 30, 2001, and they have yet to complete binding arbitration over a successor agreement. Act 312 requires parties in binding arbitration to maintain existing wages, hours and other conditions of employment pending the outcome of arbitration. In response to a severe budget crisis, the city prepared a 2005-2006 budgetary plan that called for firefighter layoffs and restructuring the fire department. The firefighters association sued in Wayne County Circuit Court, where the association obtained a court order to prevent the plan from taking effect. After conducting an evidentiary hearing, the trial judge found a fact issue concerning whether implementing the city's proposal would affect the firefighters' safety, work hours, and other employment conditions. The Court of Appeals affirmed the circuit judge's ruling in a published opinion. Although the collective bargaining agreement reserves the right to the city to "lay off personnel for lack of work or funds," the Court of Appeals held that the restructuring plan is a mandatory subject of bargaining because it affects "wages, hours and other terms and conditions of employment." The panel held that because proposed layoffs and restructuring could affect firefighters' safety, the city cannot implement its proposals on its own during Act 312 proceedings. The city appeals.

Afternoon Session

PEOPLE v HOLLEY (case no. 133264)
Prosecuting attorney: David A. McCreedy/(313) 224-3836
Attorney for defendant Julias Holley: Christine A. Pagac/(313) 256-9833
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/133264/133264-Index.htm
At issue: Following a bench trial, defendant was convicted of interference with a crime report, MCL 750.483a(1)(b). Does MCL 750.483a(1)(b) require proof beyond a reasonable doubt that a person committed or attempted to commit a crime before another person attempted to report the crime?
Background: Julias Holley was charged with assault with a dangerous weapon for allegedly threatening his girlfriend with a knife. He was also charged with the misdemeanor offense of

interference with a crime report for cutting the telephone cord while his girlfriend tried to call the police to report the alleged assault. Following a bench trial, the judge acquitted Holley of the assault charge, but convicted him of interference with a crime report; Holley was sentenced to two years of probation. The Court of Appeals, in a split unpublished decision, reversed the conviction and remanded the case to the trial court. The majority held that MCL 750.483a(1)(b), the statute that defines the offense of interference with a crime report, requires proof beyond a reasonable doubt of "a crime committed or attempted." But, the Court of Appeals said, the trial judge apparently interpreted MCL 750.483a(1)(b) to require only that the complainant *perceived* that there was "a crime committed or attempted." Accordingly, the trial judge's findings were insufficient to sustain Holley's conviction, the appellate panel said. On remand, the Court of Appeals majority instructed the trial judge to decide whether there was an actual "crime committed or attempted." The prosecutor appeals.

PEOPLE v GARDNER (case no. 131942)
Prosecuting attorney: Olga Agnello/(313) 224-5787
Attorney for defendant Caprese D. Gardner: Arthur J. Rubiner/(248) 737-4424
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Jacqueline J. McCann/(313) 256-9833
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/131942/131942-Index.htm
At issue: MCL 769.11, the third-habitual offender statute, states in part: "(1) If a person has been convicted of any combination of 2 or more felonies . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows . . . ." In *People v Stoudemire*, 429 Mich 262 (1987), clarified by *People v Preuss*, 436 Mich 714 (1990), the Michigan Supreme Court held that multiple convictions arising out of a single incident count as a single prior conviction for habitual offender purposes. Were *Stoudemire* and *Preuss* correctly decided?
Background: Caprese Gardner was convicted by a jury of second-degree murder, felon-in-possession, and felony-firearm, second offense. Gardner had two prior convictions for felony-firearm and felonious assault; these prior offenses were apparently committed on the same day. Relying on these earlier convictions, the trial court determined that Gardner was a third-habitual offender under MCL 769.11, which states that a person shall be sentenced as a third habitual offender if that person "has been convicted of any combination of 2 or more felonies . . . and that person commits a subsequent felony within this state . . . ." Gardner was sentenced to 25 to 50 years for murder, 2 to 10 years for felon-in-possession, and 5 consecutive years for felony-firearm. Gardner did not challenge the trial court's decision to sentence him as a third-habitual offender in his direct appeal, but he did raise the issue in a motion for relief from judgment. In his motion, Gardner argued that he should have been sentenced as a second-habitual offender. Gardner relies on *Stoudemire*, where the Supreme Court held that multiple convictions arising out of a single incident count as only a single prior conviction for habitual offender purposes. Gardner argued that, if he had been sentenced as a second-habitual offender, he would have received a lower sentence. The trial court and the Court of Appeals denied relief. Gardner appeals.

LATHAM v BARTON MALOW COMPANY (case no. 132946)
Attorney for plaintiff Douglas Latham: Jon R. Garrett/(313) 961-1885
Attorney for defendant Barton Malow Company: Anthony F. Caffrey III/(616) 285-3800
Trial court: Oakland County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/132946/132946-Index.htm
At issue: The plaintiff, working for a subcontractor at the defendant general contractor's construction site, was injured on the worksite. The trial court denied the defendant's motion for summary disposition. The Court of Appeals affirmed, holding that the hazard that caused the plaintiff's injury posed a risk to many workers, and that the defendant by contract was responsible for the safety of all workers. Were the proofs submitted at trial sufficient to satisfy the standard for general contractor liability that is set forth in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54 (2004)? Should the trial court have granted summary disposition to the defendant?
Background: Douglas Latham, a skilled carpenter, was working for a subcontractor at a construction site managed by general contractor Barton Malow. Latham was injured when he fell 17 feet from an opening while trying to access a mezzanine. The opening was used by the employees of many different subcontractors. An employee could only be protected against a fall by wearing a personal fall protection device, such as a double lanyard, but Latham was not wearing such a device when he fell. Latham sued Barton Malow, contending that Barton Malow should have either required Latham to wear a personal protection device or warned Latham of the danger if he failed to wear one. Barton Malow moved to dismiss the lawsuit, arguing that Latham's suit could not proceed because the hazard was open and obvious. The trial court denied Barton Malow's motion and the Court of Appeals affirmed. Where the opening posed a risk of falling to many workers, and where Barton Malow was, by contract, generally responsible for the safety of all workers at the construction site, Latham could pursue his lawsuit, the Court of Appeals held. The Court of Appeals noted that in *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004), the Michigan Supreme Court held that general contractors on construction projects may be held liable for risks posed to multiple subcontractors and their employees in "common work areas." To establish a general contractor's liability, a plaintiff must prove (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area, the *Ormsby* Court said. Barton Malow appeals, arguing in part that the Court of Appeals did not apply *Ormsby* correctly.

MILLER, et al. v PROGRESSIVE CORPORATION, et al. (case no. 131987)
Attorney for plaintiff Dawn Marie Miller: Mark R. Granzotto/(248) 546-4649
Attorney for defendant Citizens Insurance Company of America: Timothy M. McKercher/(248) 358-5645
Trial court: Washtenaw County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/131987/131987-Index.htm
At issue: The plaintiff was injured in an automobile accident in Michigan. Even though she was living in Maryland, her parents kept her on their Michigan no-fault insurance policy as an "occasional" driver. The plaintiff filed this first-party no-fault lawsuit after the defendant insurance company denied her request for no-fault personal protection insurance benefits. Can the plaintiff recover benefits? Is the plaintiff is a "person named in the policy" under MCL

500.3114(1)?
Background: Dawn Miller is a quadriplegic as a result of injuries she sustained in an automobile accident while visiting her parents in Michigan. At the time of the accident, Miller was living in Maryland. Nevertheless, Miller's parents kept her on their automobile no-fault insurance policy with Citizens Insurance Company of America as an "occasional" driver. Miller sued Citizens after the insurer denied her request for first-party no-fault personal protection insurance benefits and underinsured motorist benefits. Miller claimed that she was entitled to benefits pursuant to MCL 500.3114(1), which states "[A] personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." Citizens took the position that Miller was not entitled to benefits under its policy because she was not a named insured in the policy and was not living with her parents at the time of the accident. The trial court agreed and dismissed Miller's claims against Citizens. The Court of Appeals affirmed in an unpublished opinion. Miller appeals.

Thursday, November 8
Morning Session Only

H.A. SMITH LUMBER & HARDWARE COMPANY v DECINA, et al. (case no. 128560)
Attorney for plaintiff H.A. Smith Lumber & Hardware Company: James R. Austin/(248) 676-8178
Attorney for defendant John Decina and third party defendant John Decina Development Company: Anthony D. Rosati/(248) 737-4884
Attorney for defendant William Gardella d/b/a Williams Glass Company: Patrick A. Facca/(248) 813-9900
Trial court: Oakland County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/128560/128560-Index.htm
At issue: In this residential contract dispute, the owners paid the general contractor in full. But the general contractor paid two subcontractors only in part. The subcontractors sued to collect the unpaid balances. The trial ruled for the subcontractors on their breach of contract claims against the general contractor and awarded attorney fees. The trial court explained that its award of attorney fees to the subcontractors was granted under § 118(2) of the Construction Lien Act, MCL 570.1118(2). Are the subcontractors entitled to attorney fees?
Background: In this multi-party residential contract dispute, the owners paid in full the general contractor, John Decina and John Decina Development Company. But Decina did not pay in full two subcontractors, H.A. Smith Lumber & Hardware Company and Williams Glass Company. Smith and Williams filed construction liens on the property under the Construction Lien Act, MCL 570.1118(2), and also sued, seeking to recover the unpaid balances. The trial court ruled that the subcontractors' construction liens were valid but could not be enforced against the owners because the owners had already paid Decina, the general contractor, in full. Instead, the trial court ruled, Decina must pay Smith $9,233 and Williams $5,355 for breach of contract. The trial court also ordered Decina to pay Smith's and Williams' attorney fees; in later proceedings, the trial court clarified that it ordered payment of the fees pursuant to the Construction Lien Act, MCL 570.1118(2). That statute provides that the "court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." In a published opinion, the Court of Appeals ruled that the trial court did not err in awarding attorney fees to the subcontractors, and that such fees were

properly awarded under the Construction Lien Act. Decina appeals, arguing in part that, because Smith and Williams recovered for breach of contract and not under the Construction Lien Act, the act's attorney fee provision does not apply to them.

PEOPLE v McBRIDE (case no. 133142)
Prosecuting attorney: Joshua D. Abbott/(586) 469-5350
Attorney for defendant Mary Ann McBride: Christine A. Pagac/(313) 256-9833
Attorney for amicus curiae Michigan Association of Deaf and Hard of Hearing: Frank A. Fleischmann/(517) 582-1288
Trial court: Macomb County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/133142/133142-Index.htm
At issue: The defendant, who is deaf and mute, was charged with open murder. She moved to suppress statements she made to the police after her arrest, claiming that her written *Miranda* waiver was not knowing and voluntary. Did the prosecutor adequately demonstrate that the defendant's waiver was knowingly, intelligently, and voluntarily given?
Background: Mary Ann McBride is deaf and mute. She was charged with open murder in the death of her live-in boyfriend. Before trial, McBride moved to suppress statements that she made to detectives of the Roseville Police Department the morning after the murder. She asserted that she did not knowingly and voluntarily waive her *Miranda* rights and that the officers ignored her request for an attorney, violating her constitutional right to the assistance of counsel. The prosecutor responded that McBride was not questioned until an interpreter arrived to assist her, and that McBride signed a waiver-of-rights form. The trial judge conducted an evidentiary hearing and also reviewed a videotape of McBride's interview with the Roseville police officers. The judge then issued a written opinion suppressing McBride's statements, concluding that she did not knowingly and intelligently waive her *Miranda* rights and that questioning should have stopped when McBride asked if she needed an attorney. The prosecutor appealed. On remand from the Supreme Court, the Court of Appeals issued a published opinion that affirmed the trial court's exclusion of McBride's statement. The appeals court held that the trial court was wrong to conclude that the questioning should have ceased when McBride asked if she should have an attorney. The Court of Appeals nevertheless affirmed the suppression of McBride's statements, concluding that she did not knowingly waive her *Miranda* rights. The prosecutor appeals.

SIMPSON v BORBOLLA CONSTRUCTION & CONCRETE SUPPLY, INC., et al. (case no. 133274)
Attorney for plaintiff Dennis G. Simpson: Daryl C. Royal/(313) 730-0055
Attorney for defendants Borbolla Construction & Concrete Supply, Inc. and Cincinnati Insurance Company: Nicholas P. Moore/(248) 478-8100
Attorney for defendants Fluor Constructors International, Inc. and Travelers Casualty & Surety Company: Gerald M. Marcinkoski/(248) 433-1414
Attorney for amicus curiae Michigan Self-Insurers' Association and Michigan Manufacturers Association: Martin L. Critchell/(248) 593-2450
Attorney for amicus curiae Michigan Health and Hospital Association: Martin L. Critchell/(248) 593-2450
Tribunal: Workers' Compensation Appellate Commission
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/133274/133274-Index.htm

At issue: The plaintiff employee hurt his wrist at work in 1979, but performed strenuous work for 20 years before finally becoming disabled by the wrist condition. A magistrate found that the last 20 years of employment accelerated the deterioration of the plaintiff's wrist condition and held the defendant, the plaintiff's last employer, liable for benefits. The Workers' Compensation Appellate Commission affirmed. The Court of Appeals also affirmed, but it used a different rationale, ruling that the Michigan Supreme Court's decision in *Rakestraw v General Dynamics Land Systems, Inc*, does not apply when the employee's pre-existing condition is work-related. Is this correct? Is defendant liable for benefits?

Background: Dennis Simpson, a structural iron worker, suffered a wrist injury at work in 1979. Over time, as Simpson continued to perform the same job for a variety of employers, he developed traumatic arthritis in his wrist. Simpson's last employer was Borbolla Construction, where he worked for one day before permanently leaving employment as an iron worker. Simpson filed a claim for worker's compensation benefits. Ruling in Simpson's favor, the magistrate found that Simpson's last date of employment with Borbolla Construction "was the last time he was subjected to the conditions which generated and exacerbated his wrist disease." As a result, the magistrate said, Borbolla Construction was obligated to pay benefits to Simpson. Borbolla Construction appealed the magistrate's decision to the Workers' Compensation Appellate Commission, but the WCAC unanimously affirmed. Although Simpson only worked for Borbolla Construction for one day, the employer was still fully liable for benefits, the WCAC concluded. Relying on the Supreme Court's opinion in *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), the WCAC said that *Rakestraw* applies to all pre-existing conditions, including pre-existing work-related conditions exposed to subsequent work-related aggravation. Thus, said the WCAC, it had to evaluate whether Simpson had a medically distinguishable personal injury at work following his original work-related wrist condition, and when Simpson was last subjected to the conditions producing such a medically distinguishable personal injury. Answering both of these questions in Simpson's favor, the WCAC concluded that Borbolla Construction was liable for disability benefits. In a published per curiam opinion, the Court of Appeals affirmed the WCAC's ruling, under somewhat different reasoning. The Court of Appeals determined that *Rakestraw* did not apply under the factual circumstances of this case. Nevertheless, the Court of Appeals agreed with the WCAC that Borbolla Construction was liable to Simpson for worker's compensation benefits. Borbolla Construction appeals.

ENGLISH GARDENS CONDOMINIUM, LLC v HOWELL TOWNSHIP, et al. (case no. 132859)

Attorney for plaintiff English Gardens Condominium, LLC: Richard W. Paige/(248) 822-7800

Attorney for defendants Howell Township, Merry Bering, and Lawrence Hammond: Stephen J. Rhodes/(517) 371-8100

Trial court: Livingston County Circuit Court

Link to briefs:

http://www.courts.michigan.gov/supremecourt/Clerk/11-07/132859/132859-Index.htm

At issue: The plaintiff obtained a letter of credit to secure its obligations regarding the completion of a condominium project. When the plaintiff refused to renew the letter of credit, and in the face of several unresolved disputes about the project, the defendant township drew down the entire balance of the letter of credit. The plaintiff sued to recover the withdrawn funds. Did the township violate zoning ordinance procedures in drawing on the letter of credit and, if so, is the plaintiff entitled to recover the funds?

Background: Howell Township and English Gardens Condominium, LLC, had some disputes about the final completion status of a 10-building condominium project that English Gardens constructed in the township. These issues were unresolved as the expiration date approached for a $60,000 letter of credit that English Gardens had provided the township as security for the cost of completing the condominium project, consistent with the township's zoning ordinance and the approved site plan for the project. The township's manager and treasurer went to the bank that issued the letter of credit and drew the entire $60,000. English Gardens sued the township and the two officials to recover the $60,000, claiming breach of contract and arguing that the township failed to follow the procedures in its own ordinance. The trial judge granted the township's motion to dismiss the case. In a published per curiam opinion, the Court of Appeals affirmed the trial court's rulings in part, but reversed regarding English Gardens' claim that the township violated its zoning ordinance when it drew on the letter of credit. On remand, the Court of Appeals directed, the lower court was to order the township to return the "deposited security" to English Gardens. The defendants appeal.

HOUDINI PROPERTIES, LLC v CITY OF ROMULUS (case no. 132018)
Attorney for plaintiff Houdini Properties, LLC: Jeffrey R. Dobson, Jr./(734) 623-1624
Attorney for defendant City of Romulus: Julie McCann O'Connor/(248) 433-2000
Attorney for amicus curiae Michigan Municipal League and Public Corporation Law Section: Carol A. Rosati/(248) 489-4100
Trial court: Wayne County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/11-07/132018/132018-Index.htm
At issue: After the defendant city denied the property owner's application for a variance, the plaintiff owner appealed the variance denial and then filed a lawsuit raising constitutional claims, including one for taking. The circuit court affirmed the variance denial and also dismissed the civil lawsuit, ruling that the plaintiff violated the compulsory joinder rule and that the affirmance of the variance denial barred the constitutional claims. Was the claim of appeal a pleading to which the compulsory joinder rule applies? Does res judicata apply?
Background: Houdini Properties, LLC's owns a small parcel of land, near I-94, that is unsuitable for residential building or any other purpose permitted under the city of Romulus's current zoning. Houdini sought a billboard variance, which the city denied. Houdini appealed the city's denial of the variance to the circuit court and, six weeks later, filed a lawsuit in the same court, alleging a taking claim and other constitutional claims against the city. In general, a taking claim alleges that the government has deprived an owner of private property, or devalued the property, without just compensation. The circuit court affirmed the city's variance denial and also, on the city's motion, dismissed the complaint alleging taking and other constitutional claims. Houdini violated the compulsory joinder rule of MCR 2.203(A) by failing to include its taking and other claims in the "pleading" it filed in its appeal of the variance denial, the court said. Moreover, Houdini's constitutional claims, because of the circuit court's variance ruling, were barred by the legal doctrine of res judicata, the circuit court said. Res judiciata provides that once an issue has been litigated and ruled on by a trial court, another court cannot revisit the issue. Houdini appealed. In an unpublished opinion, the Court of Appeals affirmed the lower court. Houdini appeals.

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